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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

WATSON MARINE SERVICES, INC.

Appellant-Petitioner

v.

KLIEBERT EDUCATIONAL TRUST AND
TIMOTHY A. BECNEL INTER VIVOS TRUST

Appellee-Respondent

APPEAL OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED FOR REVIEW

1. Where, at the time appellant-petitioner's anchor pilings were placed in the bed of the Mississippi River adjacent to or adjoining appellee-respondent's riparian property, the State of Louisiana, acting through its duly authorized South Louisiana Port Commission, did not require that persons constructing such works obtain a state permit, and subsequent Port Commission regulations requiring a permit contained a grandfather clause exempting existing works, do these riparian landowners have standing, under federal or state law, to bring a private right of action in state district court to force the removal of anchor pilings constructed pursuant to a valid permit issued by the Army Corps of Engineers?
2. Where a state statute purports to grant to each riparian landowner the exclusive right to erect and maintain works or structures in that portion of the Mississippi River bed adjacent to or adjoining his riparian land, as well as the accessory right to prohibit and prevent others from using the bed of the river adjacent to or adjoining his riparian land for navigational activities which promote and further interstate commerce, unless the user pays each such riparian landowner the rent he arbitrarily demands, regardless of the reasonableness of the rental amount or other lease terms fixed by the riparian landowner; is the state statute an unconstitutional interference with Congressional power to regulate commerce "among the several states because its application constitutes a substantial impediment to the free flow of commerce across state lines?
3. Where a state statute purports to grant each riparian landowner the exclusive right to erect and maintain works or structures in that portion of the Mississippi River bed adjacent to or adjoining his riparian land, as well as the accessory right to prohibit and prevent others from using the bed of the river adjacent to or adjoining his riparian land for navigational activities which promote and further interstate commerce,

unless the user pays each such riparian landowner the rent he arbitrarily demands, regardless of the reasonableness of the rental amount or other lease terms fixed by the riparian landowner, does the state statute unconstitutionally interfere or conflict with Congressional power to regulate the local incidents of interstate commerce, in cases such as this one, where the class of acts involved are nationally significant in their aggregate economic effect.

4. Where the interpretation and application of L.S.A.-R.S. 9:1102.1 retards, impedes, burdens or otherwise constitutes an obstacle to the accomplishment and execution of the full purposes, objectives and intentions of Congress in enacting the River's and Harbors Act of 1899, must that state statute be held void, even if enacted by the Louisiana Legislature for a valid purpose and without the intention of frustrating federal law or federal policy?
5. Does L.S.A.-R.S. 9:1102.1, by purportedly granting riparian landowners or their lessees the exclusive right to place contructions in the bed of a navigable river adjacent to or adjourning their riparian property, constitute an alienation of the bed of a navigable river in violation of Article IX, Section 3 of the Louisiana Constitution of 1974?

Parties: Watson Marine Services, Inc. (no subsidiaries).

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WATSON MARINE SERVICES, INC.

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APPEAL OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

The appellant-petitioner, Watson Marine Services, Inc., respectfully prays that this Honorable Court note probable jurisdiction in this appeal or, in the alternative, that writ of certiorari issue to review the correctness of the denial of appellant-petitioner's application for a writ of certiorari or writ of review by the Supreme Court of the State of Louisiana entered on November 2, 1984.

OPINIONS BELOW

The Supreme Court of the State of Louisiana denied appellant-petitioner's application for a Writ of Certiorari or Writ of Review to the Louisiana Court of Appeal for the Fifth circuit on November 2, 1984. A copy of the decision of the Supreme Court of the State of Louisiana to deny the writs is attached hereto as Appendix A.

On July 30, 1984, the Louisiana Court of Appeal for the

Fifth Circuit affirmed the judgment of the 23rd Judicial District Court in and for the Parish of St. James, State of Louisiana. A copy of the decision of the Louisiana Court of Appeal for the Fifth Circuit is attached hereto as Appendix B. The district court judgment granted a preliminary injuction requiring Watson Marine Services, Inc. to discontinue mooring barges in the Mississippi River bordering on property owned by appellee-respondents. The preliminary injunction issued by the district court also ordered Watson Marine Services, Inc. to remove any anchor, buoy, or piling located in the bed of the river adjacent to or adjoining appellee-respondents' property. A copy of the judgment rendered by the 23rd Judicial District Court is attached hereto as Appendix C.

On January 14, 1985, Watson Marine Services, Inc. filed a Motion For Stay of Execution of Judgment Pending Application To U.S. Supreme Court in the Supreme Court of the State of Louisiana. Acting on this motion, the Supreme Court of the State of Louisiana issued an Order for Supersedeas, Stay of Execution and Stay and Recall of Mandate and Stay and Arrest of Judgment on January 15, 1985. A copy of the motion and order is attached hereto as Appendix D. Thereafter, Watson Marine Services, Inc. filed a Notice of Appeal To the Supreme Court of the United States in the Supreme Court of the State of Louisiana. A copy of this notice is attached hereto as Appendix E.

GROUNDS FOR JURISDICTION OF SUPREME COURT

The constitutional jurisdiction of the Supreme Court of the United States, granted by Article 3, Section 2, Clause 2 of the United States Constitution, is invoked pursuant to the provisions of Title 28, United States Code, Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article 1, Section 8, Clause 3:

> The Congress shall have Power ... [3] to regulate commerce ... among the several states ... "

United States Constitution, Article VI, Section 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Title 33, United States Code, Section 10:

"All of the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways."

Louisiana Constitution of 1974, Article IX, Section 3:

"The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion. This Section shall not prevent the leasing of state lands or water bottoms for mineral or other purposes. Except as provided in this Section, the bed of a navigable water body may be reclaimed only for public use."

L.A.A. - R.S. 9:1102.1:

"A. Riparian owners and their lessees of property on navigable rivers, lakes, or streams within the limits of any deep water port commission of this state, or in the absence of any such commission, within a municipality having a population in excess of five thousand inhibitants, shall have the right to erect and maintain on the batture or banks owned or leased by them and in the bed of the navigable river, lake, or stream adjacent to or adjoining such batture or banks, such wharves, buildings, or improvements as may be required for the purposes of commerce, navigation, or other public purposes. However, where such owners first have obtained the consent of the governing authority of the deep-water port commission, which consent each deep-water port commission is hereby authorized to grant, or of the municipality, as the case may be, to erect such wharves, buildings, or improvements, and same are erected in conformity to plans and specifications which have been

approved by such governing authorities, those governing authorities may expropriate said wharves, buildings, or improvements whenever said improvements or the riparian front shall be required for public purposes, and the owners shall be entitled to claim compensation to the full extent of their loss, but where such consent and approval is not obtained, the owners shall be entitled to be paid compensation therefor to the full extent of their loss or required to remove such wharves, buildings, or improvements at their own expense, in the discretion of the governing authority of the deep-water port commission or of the municipality. In all cases, such wharves, buidings, or improvements shall remain subject to the administration and control of the governing authorities with respect to their maintenance and to the fees and charges to be exacted for their use by the public.

B. Nothing herein shall deprive the levee boards of their authority with respect to levees in their respective districts or their right to appropriate, without compensation, such wharves, buildings, or improvements."

STATEMENT OF THE CASE

The appellant-petitioner, Watson Marine Services, Inc., is a Louisiana Corporation engaged in a barge fleeting operation on the Mississippi River in St. James Parish near Convent, Louisiana. A barge fleeting operation is basically a floating short-term parking lot for barges. The operator, in this case Watson Marine Services, Inc., assumes responsibility for the storage and handling of barges during the time delays between the transfer of cargo from barges to ocean-going vessels.

In order to harbor these barges, Watson Marine Services, Inc. constructed in the bed of the Mississippi River, along its eastern shore, a series of anchor pilings. Each of these submerged pilings is located completely in the bed of the Mississippi below the ordinary low water mark. A chain is attached to the anchor piling and a buoy, which floats on the surface of the river, is attached at the other end of the chain. Barges are then secured to the buoy allowing safe

harbor within the river's main channel.

Watson Marine Services, Inc. conducts its barge fleeting operations along approximately 8,000 feet of the Mississippi River in the Convent area pursuant to an Army Corps of Engineers permit. The permit was originally granted by the Corps of Engineers, Department of Army, to Ryan-Walsh Stevedoring Company on July 7, 1980. Ryan-Walsh Stevedoring Company assigned its Corps of Engineers permit to Watson Marine Services, Inc. on March 1, 1981. Thereafter, in March 1982, Watson Marine Services, Inc. placed an anchor piling in the bed of the Mississippi River, below the ordinary low water mark, in front of appellees-respondents' property. Attached to the anchor piling was a floating buoy which Watson Marine Services, Inc. utilized to fleet barges.

The appellees-respondents are Thomas J. Kliebert, in his capacity as the trustee of the Timothy A. Becnel Inter Vivos Trust and Charles S. Becnel, as trustee of the Kliebert Educational Trust. The Timothy A. Becnel Inter Vivos Trust and the Kliebert Education Trust are the co-owners of two tracts of riparian land situated on the Mississippi River in the Parish of St. James near Convent, Louisiana. Watson Marine Services, Inc. conducts a portion of its barge fleeting operation in that portion of the bed of the Mississippi River directly in front of appellees-respondents' properties. Watson Marine Services, Inc. has conducted its barge fleeting operation at this location pursuant to the Army Corps of Engineers permit without obtaining a lease from appellees-respondents.

Appellees-respondents filed the present action in the 23rd Judicial District Court in and for the Parish of St. James, State of Louisiana seeking an injunction to require Watson Marine Services, Inc. to remove the anchor piling and buoy situated in the bed of the Mississippi River directly in front of their properties. The injunction further sought an order compelling Watson Marine Services, Inc. to cease any and all operations of any nature whatsoever involving mooring and/or anchoring barges in front of their properties.

A hearing was held in this matter on May 17, 1983. Testimony at trial established that in time of ordinary low water, the mooring buoy is located some 60-75 feet offshore, and that barges are moored between the buoy and the middle

of the river, and not between the buoy and the shore. The testimony of Mr. Lanier, the engineer who devised the barge fleeting operation, indicates that the piling is located some 20-40 feet outside the mean low water mark. Also significant is the testimony regarding the use made of these properties by appellees-respondents. A small rental house is situated on one piece of property. Otherwise, there is absolutely no commercial activity on the property. Mr. Heltz testified that he thought one could get a pleasure craft in and out of the water along the normal shoreline of the property. However, he further testified that even this would be difficult because of the presence of trees and bushes along the river bank. It is noteworthy that this property is not enclosed as there is ingresas and egress by Highway 44 which intersects the property along the Mississippi River levee.

Following the hearing in this matter, the trial court took this matter under advisement. On August 4, 1983, judgment was rendered in these proceedings granting the application for preliminary injunction sought by the appellees-respondents herein. Judgment was signed on that same day, and written reasons for judgment were assigned. Basically, the trial court relied upon the provisions of LSA-R.S. 9:1102.1(A) as providing the riparian owners, the appellees-respondents herein, the exclusive right to erect and maintain works in the bed of the river immediately adjacent to the batture property owned by the appellees-respondents. The trial court determined that the United States of America, through the Corps of Engineers of the Department of the Army, has the power to regulate matters of navigation on the Mississippi River, but that it does not have such power with respect to the bed of the river. The trial court additionally concluded that Watson Marine Services, Inc. is not permitted to rely on such rights as the Corps of Engineers may grant them. The trial court further found that Watson Marine Services, Inc. failed to comply with the conditions attached unto the rights granted them by Ryan-Walsh Stevedoring Company in the act assigning the permit. Finally, the trial court further ruled that injunctive relief is proper to protect the rights asserted by appellees-respondents and that a showing of irreparable harm is not necessary in order for injunctive relief to be appropriate.

Watson Marine Services, Inc. appealed the district court's decision to the Louisiana Court of Appeal for the Fifth Circuit. While the appeal was pending, the South Louisiana Port Commission moved the Court for leave to file an amicus curiae brief in support of appellees-respondents position in this matter. The Court granted the South Louisiana Port Commission's motion for leave to file its amicus curiae brief.

The South Louisiana Port Commission asserted in its amicus curiae brief that the erection of the anchor piling and mooring buoy in the bed of the river by Watson Marine Services, Inc. required the concurrent consent of the State of Louisiana and the United States of America. By implication, it further asserted that because the South Louisiana Port Commission had not issued a permit to Watson Marine Services, Inc., the structures maintained by Watson Marine Services, Inc. in the bed of the Mississippi River had been constructed in contravention of the permit issued to Watson Marine by the Corps of Engineers.

The South Louisiana Port Commission was created in 1960 by amendment to the Louisiana Constitution of 1921. See La. Const. of 1921, Art. 6, Section 33.1. Upon the adoption of the new Constitution in 1974, the provisions pertaining to the South Louisiana Port Commission were continuted as statutes in L.S.A.-R.S. 34:2471, et seq, which were enacted by Acts 1975, No. 65, Section 1, and amended by Acts 1982, No. 664, Section 1.

However, it was not until September 22, 1982 that the South Louisiana Port Commission first adopted rules and regulations for permitting structures constructed in the beds and waters of navigible rivers within navigable rivers within its jurisdiction. Included within the aforesaid rules and regulations were certain provisions pertaining to then existing constructions and structures on water bottoms within the jurisdiction of the Port Commission. A photostatic copy of this resolution is attached herein as Appendix F for the convenience of the Court.

The Corps of Engineers' permit assigned to Watson Marine by Ryan-Walsh Stevedoring Company was granted on January 17, 1980, and the anchor piling and buoy were placed in the bed of the river in front of the appellees-

respondents' property in March of 1982, prior to the adoption of the applicable rules and regulations by the South Louisiana Port Commission.

The Louisiana Court of Appeal for the Fifth Circuit affirmed the decision of the district court and the Supreme Court of the State of Louisiana subsequently denied Watson Marine Services, Inc.'s application for a Writ of Certiorari or Writ of Review on November 2, 1984. It is in this posture that this case is before this Honorable Court on Appeal Or, In The Alternative For A Writ of Certiorari.

Finally, Watson Marine Services, Inc. would call to the attention of the Court the local political considerations which it believes prevented it from receiving a fair hearing in both the 23rd Judicial District Court and the Louisiana Court of Appeal for the Fifth Circuit, despite its clearly meritorious position under the constitution and laws of the United States. The unfavorable local political climate created by the case, which worked to the detriment of Watson Marine Services, Inc., arises from the fact that judges in both the 23rd Judicial District Court and the Louisiana Court of Appeal for the Fifth Circuit have an interest in the properties that are the subject of this lawsuit. Watson Marine Services, Inc. submits that this situation directly or indirectly influenced the result reached in this case to the prejudice of its legal rights in this matter.

SUBSTANTIALITY OF FEDERAL QUESTIONS

Watson Marine Services, Inc. raises five (5) issues for consideration by this Honorable Court. These issues bear directly upon the power of Congress, pursuant to the authority granted to it by the United States Constitution, to regulate commerce among the several states with respect to goods transported on interstate navigable waterways. Furthermore, this appeal raises serious and important questions concerning the supremacy of federal constitutional and statutory provisions when they are in direct conflict with state constitutional and statutory provisions.

1. Riparian Landownes Do Not Have Standing, Under State or Federal Law, To Bring a Private Right of Action In State District Court To Force Watson

Marine Services, Inc. To Remove Anchor Pilings Constructed In the Bed of the Mississippi River Pursuant to A Valid Army Corps of Engineers Permit, Nor To Enjoin Watson Marine Services, Inc. From Conducting Its Barge Fleeting Operations In the River.

Article 456 of the Louisiana Civil Code provides that the bank of a navigable river includes all land lying between "the ordinary low and the ordinary high stage of the water." Watson Marine Services, Inc. does not dispute that, under Louisiana law, the riparian landowner owns the bank of the river adjacent to his property. However, the river bed includes everything outside or below the ordinary low water mark. Further, under the provisions of Article 450 of the Louisiana Civil Code and under LSA-R.S. 9:1101, the beds and waters of a natural, navigable river belong to the State of Louisiana in its capacity as a public person. In this regard, LSA-R.S. 9:1101 provides as follows:

"The waters of and in all bayous, rivers, streams, lagoons, lakes and bays, and the beds thereof, not under the direct ownership of any person on August 12, 1910, are declared to be the property of the state. There shall never be any charge assessed against any person for the use of the waters of the state for municipal, industrial, agricultural or domestic purposes.

While acknowledging the absolute supremacy of the United States of America over the navigation on the navigable waters within the borders of the state, it is hereby declared that the ownership of the water itself and the beds thereof in the said navigable waters is vested in the state and that the state has the right to enter into possession of these waters when not interfering with the control of navigation exercised thereon by the United States of America. This Section shall not affect the acquisition of property by alluvion or accretion.

All transfers and conveyances or purported transfers and conveyances made by the state of Louisiana to any levee district of the state of any navigable waters and the beds and bottoms thereof are hereby rescinded, revoked and cancelled.

This Section is not intended to interfere with the acquisition in good faith of any waters or the beds thereof transferred by the state or its agencies prior to August 12, 1910." (Emphasis added)

Article 450 of the Louisiana Civil Code further provides:

"Public things are owned by the state or its political subdivisions in their capacity as public persons.

Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.

Public things that may belong to political subdivisions of the state are such as streets and public squares."

Since the anchor piling is below the ordinary low water mark as established through the testimony of Mr. Lanier, it is unquestionably situated in the bed of a navigable water body. Since the state owns the property into which the anchor piling is anchored, and from which the buoy is suspended, appellees-respondents do not have standing to bring suit under state law; as an action can only be brought by persons having a real and actual interest in the property upon which these facilities have been constructed. Watson Marine Services, Inc. filed a Peremptory Exception of No Right of Action directed to this issue, which was denied by the district court. The district court apparently based its rejection of the Exception upon its conclusion that LSA-R.S. 9:1102.1 grants to the appellees-respondents, as riparian landowners, the exclusive right to erect and maintain works in the bed of the Mississippi River adjacent to their property. The conclusion of the trial court is incorrect. LSA-R.S. 9:1101.1 provides, in pertinent part:

"Riparian owners and their lessees of property on navigable rivers, lakes, or streams within the limits of any deep water port commission of this state or, in the absence of any such commission, within a municipality having a population in excess of five thousand inhibitants, shall have the right to erect and maintain on the batture or banks owned or leased by them and in the

bed of the navigable river, lake, or stream adjacent to or adjoining such batture or banks, such wharves, buildings, or improvements as may be required for the purposes of commerce, navigation, or other public purposes. However, where such owners first have obtained the consent of the governing authority of the deep-water port commission, which consent each deep-water port commission is hereby authorized to grant, or of the municipality as the case may be, to erect such wharves, buildings, or improvements, and same are effected in conformity to plans and specifications which have been approved by such governing authorities, those governing authorities expropriate said wharves, buildings, or improvements whenever said improvements or riparian front shall be required for public purposes,and the owners shall be entitled to claim compensation to the full extent of their loss, but where such consent and approval is not obtained, the owners shall be entitled to be paid compensation therefor to the full extent of their loss or required to remove such wharves, buildings, or improvements at their own expense, in the discretion of the governing authority of the deep-water port commission or of the municipality. In all cases, such wharves, buildings, or improvements shall remain subject to the administration and control of the governing authorities with respect to their maintenance and to the fees and charges to be exacted for their use by the public."

First, LSA-R.S. 9:1101.1 does not provide that the riparian owners have the *exclusive* right to erect and maintain works in the *bed* of a navigable river. The statute simply provides that the riparian owner has a right to do so. This is a right which he did not have prior to the enactment of LSA-R.S. 9:1102.1 in 1975. Second, the statute does *not* provide that riparian owners may require the removal of any works in a bed of a navigable water body adjacent to their property. Insofar as the same is concerned, the statute is silent.

Since the statute does not expressly provide such a cause of action, the question necessarily becomes whether or not one may infer such a cause of action from LSA-R.S. 9:1102.1. The answer to this question is clearly no. Under former Article 861 of the Louisiana Civil Code, riparian

landowners had a cause of action for the removal of works built in the beds of rivers and navigable streams adjacent to their property. In this regard, former Article 861 provided:

> "Works which have been formerly built on public places, or in the beds of rivers or navigable streams, or on their banks, and which obstruct or embarrass the use of these places, rivers, streams or their banks, may be destroyed at the expense of those who claim them at the instance of the corporation of the place, or of any individual of full age residing in the place where they are situated."

Former Article 861 was repealed in connection with the passage of ACt 169 of the 1977 Session of the Louisiana Legislature. LSA-R.S. 9:1102.1 had been added to our body of law in 1975 through the passage of Act 141 of that year. The cause of action for removal of works by riparian landowners specifically provided for in Article 861, abated upon the effective date of Act 169 of the 1977 Legislative Session. The jurisprudence in Louisiana clearly holds that when a statute granting a cause of action is repealed, any cause of action arising under the statute abates. *Cooper v. Hodge,* 17 La. 476 (La. - 1841); *City of New Orleans v. Rymon,* 79 So.2d 573 (La. Ap. Orl. - 1955). Thus, the Court cannot infer a cause of action in favor of appellees-respondents when the legislature has expressly abolished a cause of action that these appellees-respondents would have had prior to the effective date of Act 169.

Appellees-Respondents may suggest that present Civil Code Article 458 grants them the same rights as those contained in the former Article 861. However, a close examination of this article reveals that it is inapplicable in the present case for two reasons, to wit:

(1) It allows removal of works built in the bed of a navigable river only when such works were constructed without lawful permit; and

(2) Before such a work can be removed, there must be an express finding that it obstructs the *public* use and not the use of riparian landowners.

In the present case, Watson Marine's anchor piling and buoy were placed in the bed and waters of the Mississippi

River pursuant to a permit issued by the Corps of Engineers. At the time the anchor pilings were constructed, no permit was required by the South Louisiana Port Commission. Further, appellees-respondents did not show, by the introduction of any evidence whatsoever, that the anchor piling and buoy obstruct the public use, nor has the Corps of Engineers or even the South Louisiana Port Commission made such a finding. Thus, Civil Code Article 458 is inapplicable to the present case. There is no showing that the work has been constructed without lawful permit, nor that the public use has been obstructed.

In light of the foregoing, appellees-respondents are obviously without the requisite standing or interest, under state law, to maintain a suit for an injunction seeking to force Watson Marine Services, Inc. to remove its anchor pilings from the bed of the river and to cease the barge fleeting operations it conducts in the waters of the river in front of their property.

With respect to appellees-respondents standing to bring a private right of action to force the removal of structures constructed in the bed of a navigable river, the Rivers and Harbors Act of 1899, specifically 33 U.S.C. § 10, as well as the prior decisions of this Honorable Court, indicate that no such standing exists under federal law. By its express terms, 33 U.S.C. § 10 provides that:

> "All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways."

In *California v. Sierra Club*, 101 S. Ct. 1775, 1780 (1980), this Honorable Court held that 33 U.S.C. § 10 did not confer a private right of action to force the removal of obstructions on navigable waterways. In reaching this conclusion, the Court analyzed prior decisions concerning the test for inferring a private right of action under a federal statute and stated that:

> It is not surprising, therefore, that there is no 'indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one.' The Court of Appeals recognized as much: 'The legislative History of the Rivers and Harbors Act of 1899 does not reflect a

> congressional intent either to afford a private remedy or to deny one.' 610 F. 2d, at 588. This silence on the remedy question serves to confirm that in enacting the Act, Congress was concerned not with private rights but with the Federal Government's ability to respond to obstructions on navigable waterways."

Id. at p. 1780. Therefore, there can be no doubt that appellees-respondents lack standing to seek the injunctions requested and, therefore, the decision of the Supreme Court of the State of Louisiana must be revised.

2. Where a State Statute Purports To Grant To Each Riparian Landowner the Exclusive Right To Erect Structures in That Portion of the Mississippi River Bed Adjacent To or Adjoining His Riparian Land, As Well As the Accessory Right To Prohibit Others From Using the Bed for Navigational Activities Which Promote Interstate Commerce, Unless the User Pays Each Such Riparian Landowner the Rent He Arbitrarily Demands, the State Statute Is An Unconstitutional Interference With Congressional Power To Regulate Commerce Among the Several States Because It Constitutes a Substantial Impediment To the Free Flow of Commerce Across State Lines.

The central issue in this entire case is whether companies conducting barge fleeting operations wholly within the bed and waters of a navigable river must obtain leases from the riparian landowners whose property borders the area of the river in which the operations are being conducted. For the reasons more fully set forth below, such a requirement is a clear violation of the Commerce Clause of the United States Constitution.

It is hornbook law that in order to validly lease property, the potential lessor must own or have the right to undisturbed possession of the property he seeks to lease. In the instant case, the property rights at issue are those pertaining to the bed and waters of the Mississippi River. Watson Marine Services, Inc. has not conducted any work on the bank of the river. All works built by it are located outside the low water mark and, consequently, entirely in the bed

and water of the Mississippi River.

There can be no room for argument that the State of Louisiana, not the appellee-respondent riparian landowners, owns the bed and waters of the Mississippi River. Article 450 of the Louisiana Civil Code provides, in relevant part, that:

> "*Public things are owned by the state* or its political subdivisions in their capacity as public persons.
>
> Public things that belong to the state are such as *running water, the waters and bottoms of natural navigable water bodies* ... (Emphasis added)

Since the present riparian landowners unquestionably do not own the bed or waters of the Mississippi River, any right to collect rent for use of the bed and waters must be based upon some status as a possessor of the right to undisturbed possession of the rights sought to be utilized by Watson Marine Services, Inc. Appellees-respondents assert that they, or their lessees, possess the exclusive, real right to construct works in the bed and waters of the river fronting their property by virtue of L.S.A.-R.S. 9:1101.1, which provides that:

> "(A) *Riparian owners and their lessees of property on navigable waters*, lakes or streams, within the limits of any deep water port commission, of this state, or in the absence of any such commission, within the municipality having a population in excess of five thousand inhabitants, *shall have the right to erect and maintain* on the batture or banks owned or leased by them and *in the bed of other navigable river,* lake or stream *adjacent to and adjoining such batture or banks, such wharves, buildings or improvements as may be required for the purposes of commerce, navigation, or other public purposes ...* " (Emphasis added)

At this point, the Court should note the following, to wit:

(1) The statute quoted above does not expressly grant to riparian owners or their lessees the *exclusive* right to build works in the bed and waters of them in front of their property; it merely recognized their right, coexistent with the rights of others (see Civil

Code Article 460 for example) to do so;

(2) The statute refers to riparian owners and their lessees of property *on* navigable rivers (i.e., lessees of the bank of the river) as opposed to lessees of property *in* the river (i.e., the bed and waters of the river); and

(3) Any works built in the riverbed and waters by riparian owners, or their lessees, of the bank must be for the purpose of commerce, navigation or other public purposes. In the present case, the riparian owners have not undertaken to build anything in the bed of the river along the banks.

Further support for the fact that L.S.A.-R.S. 9:1102.1 refers to leases of the bank, rather than the bed of the river itself, by the riparian landowner is found in L.S.A.-R.S. 41:1710, 1211 and 1213. These statutes deal specifically with who has the authority to lease state water bottoms. L.S.A.-R.S. 41:1710 provides that:

> "*Where an encroachment is located wholly upon state water bottoms* and not proximate to any bank or shore, *a lease may be granted under the procedure, terms and conditions for the leasing of public lands contained in R.S. 41:1214 through R.S. 41:1217,* except that any lease of encroachments under this section shall be limited to an area reasonably required to operate or maintain the encroachment as described in the permit for its construction. (Emphasis added)

L.S.A.-R.S. 41:1213 provides that:

> "The Register of the State Land Office, the commissioner of Conservation, and any and all branches, departments or agencies of the state or any school district, levee district, drainage district, municipal or parochial subdivision of this state, or any penal or charitable institution, or state univeristy or college, *or other unit or institution, deriving its authority and powers from the sovereignty of the state.* (Emphasis added)

As such, there is no need for Watson Marine Services, Inc. to enter into a lease with appellees-respondents as they are not one of the enumerated parties defined as possessing the

power to lease the public lands upon which the works constructed by Watson Marine Services, Inc. are situated.

However, assuming arguendo that these riparian landowners are due rent for the use of the bed and waters of a navigable river under Louisiana law, which Watson Marine Services, Inc. expressly denies, such a requirement in the present case would be unconstitutional as a violation of the "commerce clause" of the United States Constitution. Article I, Section 8, of the United States Constitution provides that:

> "The Congress shall have the power to ... regulate commerce ... among the several states ..."

In interpreting the Commerce Clause and its effects upon navigation and the use of the beds and waters of navigable rivers, this Honorable Court has held that:

> "Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold."

U.S. v. Commodore Park, 324 U.S. 386, 65 S. Ct. 803, 89 L. 2d 1017 (1945). The Court went on to hold that:

> "The United States has power to control and regulate navigable waters in the interest of commerce without payment of compensation to one who under state law may hold technical legal title, as between himself and others than the government, to a part of the navigable stream's bed."

There can be no question that the barge fleeting operation conducted by Watson Marine Services, Inc. are activities in the interest of commerce and navigation. In fact, in *Parish of Jefferson v. Universal Fleeting Co.*, 234 So. 2d 88 (La. App. 4th Cir. 1970) the Louisiana Court of Appeal for the Fourth Circuit held that barge fleeting operations, which, from the description in the opinion, were practically identical to those conducted by the defendant in this case, are activities in the interest of commerce and navigation.

The actions of appellees-respondents in the present case might, at first blush, appear trivial and insignificant when viewed against the commerce occurring among the several states at a national level. However, the serious impediment

to the free flow of interstate commerce that would result from the requirement that a barge fleet operation obtain leases from the riparian landowners whose land is adjacent to their operatins is easily illustrated. The Court should picture the length of the Mississippi River from the point it enters the State of Louisiana to the point it enters the State of Louisiana to the point it exits the state into the Gulf of Mexico. Then, it should divide this stretch of river into the 8,000 foot segments Watson Marine Services, Inc. utilizes to conduct barge fleeting operations. Under the holding of the Louisiana courts in this case, Watson Marine Services, Inc. would have to obtain a lease from each riparian land owner, at a non-uniform rate imposed by and acceptable to each landowner, in order to conduct its fleeting operations. This would require Watson Marine Services, Inc. to identify and negotiate with a multitude of riparian landowners in one 8,000 foot stretch of the river. Multiply this by the number of such 8,000 foot incriments over the entire length of the river and the burden on interstate commerce is incalculable. Further, the arbitrary refusal of a single landowner to grant a lease would frustrate the commercial operations in that area. As such, L.S.A.-R.S. 9:1102.1, as interpreted by the Louisiana courts, violates Article I, Section 8, Clause 3 of the United States Constitution and must be held invalid and void by this Court.

3. Where a State Statute Purports to Grant Each Riparian Landowner the Exclusive Right to Erect Works In That Portion of the Mississippi River Bed Adjacent To His Riparian Land, as Well as the Accessory Right to Prohibit Others from Using the Bed for Navigational Activities Which Promote Interstate Commerce, Unless the User Pays Each Riparian Landowner the Rent He Arbitrarily Demands, the State Statute Unconstitutionally Interferes With Congressional Power to Regulate the Local Incidents of Interstate Commerce, In Cases Such As This One, Where the Class of Acts Involved Are Nationally Significant In Their Aggregate Economic Effect.

As previously noted, one Louisiana Court of Appeal

held, in *Parish of Jefferson v. Universal Fleeting Co.*, 234 So. 2d 88 (La. App. 4th Cir. - 1970), that barge fleeting operations such as the one conducted by Watson Marine Services, Inc. are activities in the interest of commerce and navigation. It is unquestionable that the goods transported in these barges affect interstate commerce in a number of ways. Firstly, they travel across state lines. Secondly, even if they are exclusively a local product, they compete with other goods produced out of state and, therefore, affect the competitive pricing of products produced among the several states. Finally, the aggregate effect of the warehousing activities, vis-a-vis the asserted ability of riparian landowners to control the use of the beds of navigable rivers, is clearly nationally significant in its economic effect.

The aforesaid situation is clearly contrary to the prior decisions of the federal courts regarding the scope of Congressional power to regulate commerce. In *State of Utah By & Through Div. of Parks v. Marsh*, 740 F. 2d 799, 803 (C.A. 10th Cir. - 1984) the United States Court of Appeals for the Tenth Circuit held that:

> "Article I, § 8, C1. 3, confers on Congress the power '[t]o regulate commerce ... among the several states ... ' 'Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the states of origin and destination, which might have a substantial and harmful effect upon that commerce' ... Moreover, the triviality of an individual's act is irrelevant so long as the class of such acts might reasonably be deemed nationally significant in their aggregate economic effect."

To uphold the decisions of the Louisiana Courts in this case would seriously impede Congressional power to regulate activities which have a direct or indirect impact on interstate commerce contrary to this Court's holdings in a line of prior cases dating back to *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937). As such, it is clear that L.S.A. R.S. 9:1102.1, as interpreted and implemented by the Louisiana Courts in this case is constitutionally infirm and must be voided as being in conflict with Congressional power to

regulate commerce along the several states.

4. Where The Interpretation and Application of L.S.A.-R.S. 9:1102.1 Retards, Impedes, Burdens or Otherwise Constitutes An Obstacle To the Accomplishment and Execution of the Full Purposes, Objectives and Intentions of Congress In Enacting the Rivers and Harbors Act of 1899, It Must Be Held Void, Even If Enacted By the Louisiana Legislature For a Valid Purpose and Without the Intention of Frustrating Federal Law or Federal Policy.

It cannot be seriously questioned that the rights of companies, engaged in activities in furtherance of commerce and navigation, to utilize the beds of interstate navigable rivers, is the type of subject matter that inherently requires uniform regulation throughout the country. The Rivers and Harbors Act of 1899, particularly 33 U.S.C. § 10, reflects early Congressional recognition of this fact. Further, the Court has recognized this fact in prior cases which have held that:

> "After a state enters the Union, title to the land is governed by state law. *The state's power over the beds of navigable waters remains subject to only one limitation, the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce.* (Emphasis added).

Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 1251 (1981).

Further, the *Montana,* supra, case indicates that this dominant servitude in favor of the United States is not contingent upon who owns the riverbed. Addressing this point, the Court stated that:

> "... the United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed."

Id. at 1253.

As previously noted, the ownership of the bed of the Mississippi River is vested in the State of Louisiana pursuant to Article 450 of the Louisiana Civil Code and

L.S.A.-R.S. 9:11-1. However, the State of Louisiana, much less an individual riparian landowner, does not have full and perfect title in the bed and waters of the Mississippi River as its ownership rights are, to some extent, prempted by federal law.

Specifically, 33 U.S.C. Sec. 10 provides that:

> "All the navigable rivers and waters in the former Territories of Orleans and Louisiana *shall* be and forever remain public highways." (Emphasis added)

The jurisprudence interpreting 33 U.S.C. Sec. 10 indicates that the Act of Congress admitting the State of Louisiana into the Union conditioned its admission upon the concession that the Mississippi River and the navigable rivers and waters leading into it and the Gulf of Mexico be common highways open to the inhibitants of the other states. *Boykin v. Shaffer,* 13 La. Ann. 129 (La. - 1858).

In *U.S. v. Rands,* 389 U.S. 121, 88 S. Ct. 265 (1967), this Court emphatically declared the interest of the federal government in interstate navigable waters when it stated that:

> "This power to regulate navigation confers upon the United States a *dominant servitude ... which extends to the entire stream and stream bed* below the ordinary high water mark." *Id.,* p. 267. (Emphasis added).

In *Rands,* supra, this Honorable Court conducted a comprehensive review of the rather extensive jurisprudence dealing with the rights of the United States vis-a-vis riparian landowners. The court concluded that the United States has some rather strong rights, even the authority to impair or destroy a riparian owner's access to navigable water irrespective of a resulting decline in the market value of the land of the riparian owner. *Id.,* p. 267. *Gibson v. United States,* 166 U.S. 269, 17 S. Ct. 578 (1897); *Saraton v. Wheeler,* 179 U.S. 141, 21 S. Ct. 48, 45 L. Ed. 126 (1900); *United States v. Commodore Park, Inc.,* 324 U.S. 386, 65 S. Ct. 803, 89 L. Ed. 1017 (1945). The Court went on to state with regard to the power of Congress over the *bed* of a navigable waterway, that:

> "The proper exercise of this power is not an invasion of any private property rights in the stream *or the lands underlying* it, for the damage sustained does not result

> from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." *Id.*, p. 267.

Under *Rands,* the power of Congress relative to navigation on the Mississippi River, extends even upon the batture, and insofar as we are presently concerned, all the way inland to the levee for the Court recognized that the navigational servitude of the United States extends to the high water mark. *Id.*, p. 267.

The power to regulate navigation in the navigable waters of the United States has been delegated by Congress to the Corps of Engineers, a division of the Department of the Army, pursuant to Section 10 of the Rivers and Harbors Appropriation Act, 33 U.S.C. Sec. 401, et seq. The power of the Corps of Engineers is specifically defined in 33 U.S.C. 403, which provides:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the Waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, beachhead, jetty, or other structures, in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretry of the Army; ..."

At trial, Mr. Stewart, a representative of Watson Marine Services, Inc., testified that the installation of the anchor piling and buoy in question had been approved by and accomplished under the supervision of the Corps of Engineers.

The Corps of Engineers, pursuant to the direction of Congress, has exercised this dominant federal servitude by permitting Watson Marine to place the anchor pilings in the bed of the Mississippi River in order to facilitate navigation. Under the rule of *Rands,* supra, this activity predominates over any rights granted to or by the State of Louisiana as Congress has preemptive authority over navigable waters

under Article I, Section 8 of the U.S. Constitution.

In rejecting this argument, the Louisiana district court concluded that while the United States, through its Corps of Engineers, has the power to regulate matters of navigation upon the Mississippi River, the United States has no power with respect to the bed of the river, the latter being vested in the State of Louisiana. This conclusion is erroneous in light of the holding of the United States Supreme Court in *Rands*, supra, that the power to regulate navigation extends even to the bed of the waterway and in light of 33 U.S.C. 403.

The district court went on to find that the warehousing operation being conducted in the present case relates to the bed of the stream and not to matters of navigation. Watson Marine Services, Inc. respectfully disagrees with this factual finding by the district court as the question of whether a barge fleeting operations is a matter of navigation has previously been decided by the Fourth Circuit Court of Appeals in *Parish of Jefferson v. Universal Fleeting Co.*, 234 So. 2d 88 (La. App. 4 - 1970).

Despite the existence of the dominant servitude, the district court went on to apparently hold that L.S.A.-R.S. 9:1102.1 is applicable herein and affords the appellees-respondents herein the *exclusive* right to construct navigational facilities in an undefined area of the bed of the Mississippi River in fron of their properties. The grant of authority to riparian landowners contained in L.S.A.-R.S. 9:1102.1 is clearly not exclusive. For example, Article 460 of the Louisiana Civil Code authorized port commissions and municipalities to construct and maintain, in the beds of natural navigable water bodies, any works necessary for public utility. Further, L.S.A.-R.S. 9:1102.1 itself gives the particular port commission or municipality within which the waterway at issue is situated, the power to expropriate any construction made by the riparian landowner in the bed of the river, administer and control such works or require their removal.

Finally, the district court stated that L.S.A.-R.S. 9:1102.1 is merely an expression of the fact that the concurrent permission of both the United States and the State of Louisiana is required before a structure may be constructed in the bed of a navigable river. However, the district court

erroneously relied upon this Honorable Court's holding in *Cunnings v. City of Chicago,* 23 S. Ct. 472 (1903) for this proposition because the question present in this case, namely the supremacy of interest of the United States vis-a-vis a conflicting state statute, was expressly left open in *Cunnings,* supra, to wit:

> "We do not overlook the long settled principle that the power of Congress to regulate commerce among the states is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. But we will not at this time make any declaration of opinion as to the full scope of this power, or as to the extent to which Congress may go in the matter of the erection of docks and like structures in navigable waters that are entirely within the territorial limits of the several states. *Whether Congress may, against or without the expressed will of a state, give affirmative authority to private parties to erect structures in such water, it is not necessary in this case to decide."* (Emphasis added) *Id.,* at 477.

Additionally, the district court decision in this regard was clearly erroneous under the facts of this case because, as previously noted, Watson Marine Services, Inc. built this anchor piling prior to the adoption of rules and regulations governing such construction by the South Louisiana Port Commission. Also, the rules and regulations subsequently adopted exempted existing structures built under a valid Army Corps of Engineers' permit. Therefore, the district court's findings in this regard are erroneous and are not relevant to a proper determination of this lawsuit.

L.S.A.-R.S. 9:1102.1, as interpreted by the Louisiana courts is in direct conflict with 33 U.S.C. § 10 and, under the Supremacy Clause of the United States Constitution, must be declared void by this Court.

5. L.S.A.-R.S. 9:1102.1, By Purportedly Granting Riparian Landowners the Exclusive Right To Place Construction In the Bed of A Navigable River Adjacent to Their Riparian Property, Constitutes an Alienation of the Bed of A Navigable River In Violation of Article IX, Section 3 of the Louisiana Con-

stitution of 1974.

Appellees-respondents cannot cite this Court to any authority, constitutional, statutory or jurisprudential, which would require payment of rent to them by persons utilizing the bed and waters of the navigable river fronting their property The reason that no such authority exists is quite simple. Any such rule of law would clearly be unconstitutional. Article IX, § 3, of the Louisiana Constitution of 1974 provides that:

> "The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body ... "

In discussing the meaning of Article IX, § 3, of the Louisiana Constitution of 1974, Professor Lee Hargrave, coordinator of legal research for the Louisiana Constitutional Convention of 1973, noted that:

> "The strong Civil Code policy against private ownership of the beds of navigable water bodies, which became a constitutional rule through Article 2, Section 2 of the 1921 Constitution, continues in Article IX, Section 3 of the 1974 Constitution ... It is clear by this provision that *the state itself cannot alienate the bed of a navigable water body, and any attempt to do so is null.* Moreover, *the state cannot 'authorize the alienation' by any other governmental agency or by a general statute.* More broadly, *Section 3 is the basis for saying,* consistent with traditional Civil Code principles, *that these beds are out of commerce and insusceptible of private ownership. Not only are sales or other contractural alienations impossible* ... (Emphasis added).

43 La. L. Rev. 660.

In the present case, should the grant in L.S.A.-R.S. 9:1102.1 be deemed an exclusive right of use or possession, such a construction would render the statute unconstitutional under Article IX, Section 3 of the Louisiana Constitution of 1974. In only one case have Louisiana Courts had an opportunity to define the terms "alienate" and "alienation" used in Article IX, Section 3. In *Save Our Wetland, Inc. v. Orleans Levee Board,* 368 So. 2d 1210 (La. App. 4 - 1979), the Fourth Circuit Court of Appeal looked only to Black's Law Dictionary, Fourth Edition, for as-

sistance in defining the terms:

> "Alienation is defined in Black's Law Dictionary, Fourth Edition, page 96 as follows:
>
> ... *the transfer of the property and possession* of lands, tenements, or other things, from one person to another."
>
> "*Alienate* is defined as:
>
> To convey; to transfer the title to property." (Emphasis added).

Therein, the Court concluded that the terms were indicative of a transfer of ownership or title, a conclusion which Watson Marine Services, Inc. suggests is inappropriate herein because of the unique nature of our laws regarding navigable waters and the ineraction of the competing rights of all our citizens. In the most traditional or ordinary sense, counsel concedes that "alienate" or "alienation" are suggestive of a transfer of title. However, we are not concerned presently with a case in which a landowner has a pure and absolute ownership interest in his property. Nor does the State of Louisiana, even under L.S.A.-R.S. 9:1101 and Article 460 of the Louisiana Civil Code, have pure and absolute ownership of the bottoms of the navigable waters of this state. Under Article I, Section 8, of the U.S. Constitution and the jurisprudence interpreting that provision, the citizens of this nation have certain rights of use of navigable waters. *U.S. v. Rands*, supra. Those rights of use for navigational purposes would be preempted should the State of Louisiana, pursuant to Article IX, Section 3 of its Constitution, transfer either ownership or possession to another.

Although a transfer of possession alone is sufficient in order for L.S.A.-R.S. 9:1102.1d to accomplish an unconstitutional alienation of the bed of a navigable water body, the statute apparently goes further as it requires expropriation in order for the owner, the State, to obtain possession of the improvements constructed by the owner of the property adjacent to the water. If mere possession was being conferred, these works would become a "component part" of the land under Article 456 of the Louisiana Civil Code, a concept somewhat similar to the concept of "immovable by destination" with which we were familiar until the

comprehensive revision of the section of our Civil Code dealing with immovables in 1978. As components of the land, they would revert to the landowner without the necessity for expropriation. Accordingly, L.S.A.-R.S. 9:1102.1, in effect transfers something more than mere possession, and is unconstitutional under Article IX, Section 3, and an abuse of legislative power.

CONCLUSION

Based upon the conflicts between L.S.A.-R.S. 9:1102.1 and Article I, Section 8, Clause 3 and Article VI, Section 2 of the United States Constitution, the statute is clearly unconstitutional and must be voided. Additionally, the interpretation given the statute by the Louisiana courts conflict with 33 U.S.C. § 10 and Article IX, Section 3 of the Louisiana Constitution of 1974. These two provisions provide a further basis for voiding the statute and reversing the decision of the Louisiana Courts in this case Therefore, Appellant-petitioner Watson Marine Services, Inc. respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana in this matter.

Respectfully submitted,

COOPER & THOMPSON
P. O. Box 14647
Baton Rouge, LA 70898-4647
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WILLIAM H. COOPER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WATSON MARINE SERVICES, INC.

Appellant-Petitioner

v.

KLIEBERT EDUCATIONAL TRUST AND
TIMOTHY A. BECNEL INTER VIVOS TRUST

Appellee-Respondent

PROOF OF SERVICE

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

William H. Cooper, Jr., after being duly sworn, deposes and says that pursuant to Rules 28.3 and 28.4(c) of this Court, he has served the written APPEAL OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CETIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA on counsel for the appellee-respondent and on the Attorney General for the State of Louisiana, since 28 U.S.C. § 2403(b) may be applicable to the present case, by enclosing a copy thereof in an envelope, first class postage prepaid, properly addressed to:

1. Thomas J. Kliebert, Esq.
   KLIEBERT & HELTZ
   Post Office Drawer 580
   Gramercy, Louisiana 70052
2. William J. Guste, Jr.
   Attorney General for the State of Louisiana
   Post Office Drawer 94005
   Baton Rouge, Louisiana 70804

and depositing same in the United States mail at Baton Rouge, Louisiana, on the 30th day of January, 1985.

William H. Cooper, Jr., Affiant

Sworn to and subscribed before me in my office in Baton Rouge, Louisiana, this 30th day of January, 1985.

Notary Public In and For Said Parish and State. My Commission is for Life.

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE STATE OF LOUISIANA

KLIEBERT EDUCATIONAL TRUST
AND TIMOTHY A. BECNEL INTER
VIVOS TRUST

vs.

WATSON MARINE SERVICES, INC. NO. 84-C - 1621

IN RE: Watson Marine Services, Inc., Applying for Writ of Certiorari, Writ of Review to the Court of Appeal, Fifth Circuit, Number 83-CA-713; Parish of St. James, 23rd Judicial District Court Div. "A", Number 15,683

November 2, 1984

Denied.

HTL
JAD
PFC
WFM
JLD
FAB
JCW

LEMMON, J., concurs. The Court of Appeal erred in treating relator's objection to issuance of a permanent injunction in a summary proceeding, but relator does not raise that issue in this appeal.

Supreme Court of Louisiana
November 2, 1984

Clerk of Court
For the Court

APPENDIX B

KLIEBERT EDUCATIONAL TRUST, and TIMOTHY A. BECNEL INTER VIVOS TRUST	: NO. 83-CA-713
	: COURT OF APPEAL
	: FIFTH CIRCUIT
VERSUS	
	: STATE OF LOUISIANA
WATSON MARINE SERVICES, INC.	

APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
PARISH OF ST. JAMES, NO. 15,683, DIVISION "I"
HONORABLE LEON J. LeSUEUR, JUDGE

CHARLES GRISBAUM, JR.
JUDGE

(Court composed of Judges Nestor L. Currault, Jr., Charles Grisbaum, Jr., and Edward A. Dufresne, Jr.)

KLIEBERT & HELTZ
THOMAS J. KLIEBERT, JR., for plaintiffs-appellees
Post Office Drawer 580
Gramercy, Louisiana 70052

McCOLLISTER, McCLEARY, FAZIO & HOLLIDAY
WILLIAM C. SHOCKEY, for defendant-appellant
1800 One American Place
Post Office Box 2706
Baton Rouge, Louisiana 70821

AFFIRMED

This is an appeal by the defendant, Watson Marine Services, Inc., devolutively taken from a judgment granting a preliminary injunction requiring it to discontinue mooring barges in the Mississippi River bordering on the plaintiffs'

property and suspensively taken from that part of the judgment requiring the defendant remove any anchor, buoy, or piling in the bed of the river immediately bordering on the plaintiffs' property. We affirm.

Three issues are presented:

(1) Whether plaintiffs, riparian landowners, have standing to assert their action requesting the defendant's mooring operations on the Mississippi River be enjoined;

(2) Whether LSA R.S. 9:1102.1 is preempted by federal legislation enacted pursuant to the Commerce Clause; and

(3) Whether the trial court erred in granting the landowners injunctive relief.

Watson Marine is engaged in barge fleeting operations which are conducted in the Convent, Louisiana area of St. James Parish in the Mississippi River on both sides of, as well as in front of, the land owned by the plaintiffs and abutting the river. The plaintiffs filed suit against Watson Marine Services, Inc. seeking to enjoin the warehousing of barges immediately in front of their properties and seeking removal of buoys and anchor pilings from the river bed. Watson Marine admits mooring operations were conducted without the approval or permission of the South Louisiana Port Commission or the plaintiffs but solely upon the authority of a permit issued by the United States Corps of Engineers to Ryan-Walsh Stevedoring Company and assigned ultimately to Watson Marine. Within the contract of assignment is a specific requirement that either batture leases or authorization be obtained from the landowners.

In the trial court, the defendant filed exceptions of no right or cause of action and improper use of summary proceedings. The court overrules the exceptions and determined from the trial on the merits the plaintiffs were entitled to relief as prayed.

Watson Marine contends the plaintiffs do not own any part of the bed of the Mississippi River and have no standing to assert claims involving the use by others of the waterway bordering on their property. Article 681 of the Louisiana Code of Civil Procedure allows that an action be brought only by a person having a real and actual interest which he asserts. We find the plaintiffs have asserted a real and

actual interest.[1] While it is true the State of Louisiana, pursuant to article 450 of the Louisiana Civil Code, is the owner of the river bottom, the banks of navigable rivers subject to public use are privately owned by the riparian landowners as provided by article 456 of our Civil Code. Riparian landowners, by virtue of Louisiana Revised Statute 9:1102.1, own the right to erect and maintain on the batture, banks, and bed of the river, buildings and improvements as may be required for commerce, navigation, or other public purposes. This right is subject only to a requirement that the landowner obtain a permit from the South Louisiana Port Commission authorizing such work, and such permit is to be denied only when the Port Commission finds denial to be in the best interest of the public for no reason other than violation of safety or accepted navigation regulations.[2] Thus, the state legislature has granted a real right to these riparian landowners to erect and maintain buildings and improvements on the river subject only to the Port Commission's duty to protect the public's best interest.

There is no Louisiana statute which grants a right to erect and maintain buildings and improvements on the river to persons other than riparian landowners and their lessees, the negative implication being that only landowners and their lessees have this right. The language of Louisiana

---

1. The plaintiffs' petition states in pertinent part:

> ... In order to protect plaintiff's rights and interest in the premises, it is necessary that defendants be ordered to cease any and all operations with respect to mooring and/or anchoring barges in the front of plaintiffs' properties, that they be ordered to remove the mooring buoy set in the river in the front of plaintiffs' properties and any mooring lines from the waters of the river to the shore and to restore the surface of plaintiffs' properties to the same condition as it was prior to the defendants' entry thereon and action above described taken in connection with said operations, and from interfering with plaintiffs' properties in any manner, either on the shore or in connection with plaintiffs' rights appertaining to said properties as riparian owners.

2. The South Louisiana Port Commission was created by the Louisiana legislature as expressed in Louisiana Revised Statute 34:2471 and empowered to enact regulations and issue permits authorizing the erection and maintenance of buildings and improvements on the river pursuant to Louisiana Revised Statute 34:2473.1(B) and (C).

Revised Statute 9:1102.1, "and their lessees," indicates a presupposition that a non-landowner must obtain a lease from the riparian owner before seeking authorization of his commercial purposes from the Port Commission. The plaintiffs have standing to protect their right against the defendant who, prior to the trial court's judgment, had been warehousing barges on the river without first negotiating a lease agreement or attempting to obtain authorization from anyone in this state.

Secondly, it is asserted by Watson Marine, Inc. that state legislation regulating the erection and maintenance of buildings and improvements in navigable waterways in Louisiana is unconstitutional because the United States Congress, pursuant to the Commerce Clause of the United States Constitution, has enacted 33 U.S.C. § 10[3] and 33 U.S.C. § 403[4] and thus preempted the field.

The United States Supreme Court in *Cummings v. Chicago,* 188 U.S. 410, 431; 23 S. Ct. 472, 477; 47 L.Ed. 525 (1903) held the authority of a state to prohibit the erection, without its permission, of a structure in a navigable river wholly within its limits, was not superseded by 33 U.S.C. § 403. The court addressed whether Congress had intended to ignore Illinois legislation regulating the erection of structures in a navigable river wholly within the state by empowering the Secretary of War to issue permits for construction in the navigable waterway:

> ... the effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the State Government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them.

---

3. 33 U.S.C. § 10 provides that all navigable rivers shall remain public highways.

4. Pursuant to §403, nothing obstructive can be built outside harbor lines or where there are not harbor lines *except* on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. (Emphasis added)

> But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies.

In *Zabel v. R. P. Tabb,* 296 F.Supp. 764, 765 (M.D. SLA 1969), the court acknowledged the *Cummings* rule that a party is required to seek approval for the erection of structures in a navigable waterway from local agencies as well as federal agencies. The court in *Norfolk Dredging Company v. Radcliff Materials, Inc.,* 264 F.Supp. 399, 401 (E.D. Vir. 1967), followed the *Cummings* decision and stated that a permit issued by the Federal Government merely expresses the assent of the Federal Government so far as concerns the public rights of navigation but in no way obviates the necessity of obtaining state assent to the work authorized. Reflecting the *Cummings* rule is the United States Army Corps of Engineers permit, issued to Ryan-Walsh and ultimately assigned to the defendant Watson Marine, Inc., which specifically states the concurrent consent of state and local authorities for erection and maintenance of buildings and improvements in the navigable waterway is required.

The State of Louisiana in article 450 of the Civil Code has reserved to itself the ownership of the beds of the navigable waterbodies within its borders. The Louisiana legislature in creating the South Louisiana Port Commission and empowering it to enact certain regulations governing constructions on the river (LSA R.S. 34:2471-2477) and in enacting Louisiana Revised Statute 9:1102.1 did not unreasonably interfere with navigation but acted within its concurrent jurisdiction.

Finally, we are called upon to decide whether the trial court erred in ordering, as requested by the plaintiffs, the defendant's mooring operations be discontinued and any buoy, anchor, or piling located in the river in front of the plaintiffs' property be removed. The defendant contends the preliminary injunction mandating permanent removal of any buoy, anchor, or piling located in front of the plaintiffs' property was granted subsequent to a summary judgment and therefore improper. Article 3602 of the Louisiana Code of Civil Procedure provides that a preliminary injunction is decided in summary proceedings whereas a hearing for a

permanent injunction is by way of *ordinary proceedings,* with a fully-developed trial on the merits. Louisiana jurisprudence, however, allows an injunction on ex parte application only in cases where the purpose to be accomplished is to restrain or prohibit something from being done. *Red River v. Noles,* 406 So.2d 294, 298 (La. App. 3d Cir. 1981). In its *mandatory* form, when it commands the doing of something, it cannot be issued without a hearing on the merits. *Red River v. Noles, supra.* The removal of any anchor, buoy, or piling from the bed of the river is in mandatory form, and thus requires a full hearing on the merits. Watson Marine further contends that because in their petition the plaintiffs requested merely a rule to show cause, it was not given adequate notice of the plaintiffs' intention to proceed with a full trial on the merits on the issue of the mandatory injunction requiring removal of anchors, buoys, or pilings. Article 3602 provides that a preliminary as well as a permanent injunction shall not issue unless notice is given to the adverse party and there is an opportunity for a hearing.

The trial court, in its reasons for denying the exception of improper use of summary procedure, stated:

> This defense was raised for the first time on the morning of the hearing at which time it was argued and overruled. After the exception was overruled the defendant then proceeded to trial without apparent difficulty. Witnesses, expert and otherwise, were called and testified and other evidence introduced. There is neither allegations nor showing that any disadvantage resulted ... Defendant has not been prejudiced by the procedural method employed and ... Plaintiffs are entitled to the relief for which they have prayed.

In *Red River v. Noles, supra,* a preliminary injunction requiring an owner to remove permanent buildings from a servitude of a levee district was upheld because, as the appellate court found, the evidence presented at the hearing was not limited, both parties presented testimony, and the trial court permitted a full hearing on all issues in controversy, and therefore, the injunction had not been issued merely upon a prima facie showing.

Accordingly, we find, as the trial court did, Watson

Marine Services, Inc. has not been prejudiced by the procedural method employed. The defendant is unable to show any disadvantages to itself, and it is clear from the record Watson Marine was given full opportunity to present evidence on the merits of the case. The plaintiffs' pleadings were sufficient and adequate to put the defendant on notice that the plaintiffs had requested relief in the form of the permanent removal of any buoy, anchor, or piling located in front of their property. While the plaintiffs in their petition requested a rule to show cause, no technical forms of pleading are required in Louisiana, pursuant to article 854 of our Code of Civil Procedure, and additionally, article 865 of the Louisiana Code of Civil Procedure provides that every pleading shall be so construed as to do substantial justice.

The defendant claims the injunction was improperly issued in that the plaintiffs suffered no irreparable harm which is pursuant to article 3601 of the Louisiana Code of Civil Procedure, a necessary element that must be proven in order to obtain injunctive relief. However, an injunction granted pursuant to article 3663 of the Louisiana Code of Civil Procedure may be granted without any showing of irreparable injury. *Elliot v. Louisiana Intrastate Gas Corporation,* 336 So.2d 925, 926 (La. App. 3d Cir. 1976). Article 3663 provides in pertinent part that injunctive relief is available to a person who is disturbed in the possession which he has had for more than a year of a real right of which he claims the ownership. The trial court concluded the plaintiffs proved a trespass, and injunctive relief pursuant to article 3663 was properly granted.

Accordingly, we affirm the judgment of the trial court, all costs to be paid by the appellant.

AFFIRMED

APPENDIX C

KLIEBERT EDUCATIONAL TRUST, ET AL	: 23RD JUDICIAL DISTRICT COURT
	: PARISH OF ST. JAMES
VERSUS NO. 15,683	: STATE OF LOUISIANA
WATSON MARINE SERVICES, INC. ET AL	

Filed _____ _____
Clerk of Court

JUDGMENT

This matter was tried on May 17, 1983.

Present: Thomas J. Kliebert Jr. and Michael Heltz, attorneys for plaintiffs

William C. Shockey, attorney for defendant

After the conclusion of the hearing, the Court heard the arguments of counsel and the matter was taken under advisement. Counsel were ordered to submit memoranda within ten days.

Concluding that the law and the evidence are in favor of the plaintiffs for the reasons assigned in the written opinion of this Court filed this day,

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. A preliminary injunction issue herein as prayed for, conditioned on plaintiffs furnishing bond in the amount of $1,000.00, directed to Watson Marine Services, Inc., restraining, enjoining and prohibiting them, their agents, employees, and all person, firms or corporations acting or claiming to act in their behalf, or in concert with them from conducting any and all barge operations of any nature whatsoever immediately adjacent to and fronting plaintiffs' property and particularly from securing any barge or fleet of barges to any buoy or anchor which permits such barge or barges to be positioned in whole or in part in front of plaintiffs' property.

2. That defendant, Watson Marine Services, Inc., is

hereby ordered to remove forthwith the floating anchor or buoy and anchor or pile in the bed of the river immediately fronting plaintiffs' property to which said floating anchor buoy is attached.

JUDGMENT READ AND SIGNED this 4th day of August, 1983.

I hereby certify that the above and foregoing is a true and correct copy of the original on file and record in my office.

Clerk of Court
& Ex-Officio Recorder
Parish of St. James,
Convent, La.

JUDGE DIV. A

APPENDIX D

THE SUPREME COURT
OF THE STATE OF LOUISIANA

KLIEBERT EDUCATIONAL TRUST
AND TIMOTHY A. BECNEL
INTER VIVOS TRUST

VERSUS

WATSON MARINE SERVICES, INC. NO. 84-C-1621

NOTICE OF APPEAL TO THE SUPREME COURT

NOTICE IS HEREBY GIVEN that Watson Marine Services, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final decree of the Supreme Court of the State of Louisiana denying appellant's application for a writ of certiorari or writ of review to the Louisiana Court of Appeal for the Fifth Circuit entered in this proceeding on November 2, 1984.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

Baton Rouge, Louisiana, this 30th day of January, 1985.

William H. Cooper, Jr.
COOPER & THOMPSON
5757 Corporate Boulevard, Suite 101
Baton Rouge, Louisiana 70808
Telephone: (504) 927-6765

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States has been served upon Kliebert Educational Trust and Timothy A. Becnel Inter Vivos Trust, by mailing a copy thereof, properly addressed and first class postage prepaid, to their counsel of record herein, Thomas J. Kliebert, Jr., KLIEBERT & HELTZ, Post Office Drawer 580, Gramercy, Louisiana 70052, on this 30th day of January, 1985, at Baton Rouge, Louisiana.

_____

William H. Cooper, Jr.

THE SUPREME COURT
OF THE STATE OF LOUISIANA

KLIEBERT EDUCATIONAL TRUST
AND TIMOTHY A. BECNEL
INTER VIVOS TRUST

VERSUS

WATSON MARINE SERVICES, INC. NO. 84-C-1621

REQUEST FOR CERTIFICATION AND TRANSMISSION OF RECORD

TO: Clerk of the Supreme Court of the State of Louisiana

Pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States you are hereby requested by Watson Marine Services, Inc., appellant, to certify and transmit to the Supreme Court of the United States the entire record herein.

Baton Rouge, Louisiana, this 30th day of January, 1985.

William H. Cooper, Jr.
COOPER & THOMPSON
5757 Corporate Boulevard, Suite 101
Baton Rouge, Louisiana 70808
Telephone: (504) 927-6765

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Request for Certification and Transmission of Record has been served upon Kliebert Educational Trust and Timothy A. Becnel Inter Vivos Trust, by mailing a copy thereof, properly addressed and first class postage prepaid, to their counsel of record herein, Thomas J. Kliebert, Jr., KLIEBERT & HELTZ, Post Office Drawer 580, Gramercy, Louisiana 70052, on this 30th day of January, 1985, at Baton Rouge, Louisiana.

_____

William H. Cooper, Jr.

APPENDIX E

MOTION FOR STAY OF EXECUTION OF JUDGMENT PENDING APPLICATION TO U.S. SUPREME COURT

TO THE
SUPREME COURT OF LOUISIANA
NUMBER 84-C-1621

KLIEBERT EDUCATIONAL TRUST, ET AL
VERSUS
WATSON MARINE SERVICES, INC., ET AL

APPLICATION BY

WATSON MARINE SERVICES, INC.
DEFENDANT, APPELLANT, APPLICANT

DURWARD McLAUGHLIN

BENNETT, McLAUGHLIN,
SHOEMAKER & AVERY
251 FLORIDA STREET, SUITE 400
BATON ROUGE, LOUISIANA 70801

ATTORNEYS FOR DEFENDANT,
APPELLANT, APPLICANT

The petition and motion of Watson Marine Services, Inc., with respect represents and shows that:

I.

This is a suit by riparian landowners of tracts fronting on the Mississippi River in St. James Parish to enjoin the defendants from conducting any barge operations in the Mississippi River, adjacent to and fronting on their property; and to cause the removal of a mooring buoy (or floating anchor) and the piling to which it is attached that is anchored in the bed of the Mississippi River adjacent to their property.

II.

A preliminary injunction was granted to the plaintiffs and against the defendant, mover herein, on the 4th day of August, 1983 by the 23rd Judicial District Court, in and for the Parish of St. James.

III.

Defendants perfected an appeal to the Court of Appeal, Fifth Circuit, of the State of Louisiana, No. 83-CA-713, and on July 30, 1984, that court affirmed the judgment of the trial court.

IV.

This honorable court denied mover's application for a writ of certiorari on November 2, 1984.

V.

Under the provisions of Title 28, Section 1257 of the United States Code, Title 28, Section 1257, Federal Code Annotated, petitioner has a right of appeal, as of right, to the Supreme Court of the United States, and in addition petitioner has the right to apply for certiorari to the Supreme Court of the United States and said rights exist for a period of ninety (90) days from the 2nd day of November, 1984.

VI.

Petitioner intends to appeal this case to the United States Supreme Court and also (in the alternative) to apply to said court for a writ of certiorari within the time limit allowed by law. Petitioner is entitled to an order staying and recalling the issuance of the mandate herein, and staying and arresting the execution of the judgment herein until petitioner has had time to prepare and present its application for said appeal and for writs and to have the same acted upon. In the event that petitioner shall timely file its notice of appeal to the Supreme Court of the United Sates, it is entitled to an order staying and recalling the mandate herein and staying and arresting the execution of the judgment herein, until the Supreme Court of the United States shall have made its final disposition of this case.

VII.

The denial of this writ of supersedeas will adversely affect the applicant in that it will make moot our right of appeal to the United States Supreme Court by enabling the plaintiff/appellant to execute on the judgment during the

interim.

VIII.

No harm, damage or expense can occur or accrue by reason of the supersedeas herein sought and, therefore, petitioner is entitled to the order herein prayed for, without furnishing bond, or (alternatively) upon the furnishing of a normal bond.

DURWARD McLAUGHLIN
ATTORNEY FOR PETITIONER

BENNETT, McLAUGHLIN,
SHOEMAKER & AVERY
251 Florida, Suite 400
Baton Rouge, LA 70801
Business (504) 383-2619
Home (504) 766-3379

VERIFICATION

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

Before me, the undersigned authority, personally came and appeared Durward McLaughlin, who being by me first duly sworn did depose and say and certify that he is a member of the firm of Bennett, McLaughlin, Shoemaker & Avery, and is one of the attorneys for, and is counsel of record for Watson Marine Services, Inc., petitioner and mover herein; that all of the statements of fact in the above and foregoing petition are true and correct to the best of his knowledge, information and belief; that a copy of this petition and motion has been served upon Kliebert Educational Trust and Timothy A. Becnel Inter Vivos Trust, by mailing a copy thereof, postage prepaid, to his counsel of record herein, Thomas J. Kliebert, Jr., Kliebert and Heltz, P. O. Drawer 580, Gramercy, Louisiana; done this 10th day of January, 1985, at Baton Rouge, Louisiana.

DURWARD McLAUGHLIN

Sworn to and subscribed before me this 10th day of January, 1985.

NOTARY PUBLIC

I certify that a copy of this petition and motion has been served upon Kliebert Educational Trust and Timothy A. Becnel Inter Vivos Trust, by mailing a copy thereof, postage prepaid, to his counsel of record herein, Thomas J. Kliebert, Jr., Kliebert and Heltz, P. O. Drawer 580, Gramercy, Louisiana; done this 10th day of January, 1985, at Baton Rouge, Louisiana.

ORDER FOR SUPERSEDEAS, STAY OF EXECUTION AND STAY AND RECALL OF MANDATE AND STAY AND ARREST OF JUDGMENT

On consideration of the petition and motion of Watson Marine Services, Inc., appellant in the above numbered and entitled cause:

IT IS ORDERED that the execution and mandate and enforcement of the judgment and decree rendered in the above entitled and numbered cause be, and it is hereby, stayed, and arrested pending and until the 31st day of January, 1985, in order to permit Watson Marine Services, Inc., to appeal herein to the Supreme Court of the United States, and (in the alternative) to seek a writ of certiorari from said Court. In the event Watson Marine Services, Inc. shall timely file a notice of appeal to the Supreme Court of the United States (or timely apply to said court for writs of certiorari or review), then it is ordered that the execution and mandate, and enforcement of the judgment and decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed and arrested until the Supreme Court of the United States shall have made its final disposition of this case, and until the disposition of this matter shall have become final. If the original record of these proceedings has been returned by this court to the trial court, Frans J. Labranche, Jr., the Clerk of the Supreme Court of the State of Louisiana is ordered and commanded to recall the record, and to hold the record in the possession of this court, until further order, pending appeal or application for writs. These orders are [effective without the necessity of bond] conditioned according to law, and further conditioned upon the said applicant being liable for any and all damages which may accrue to the plaintiff by reason of this supersedeas.

New Orleans, Louisiana, this 15th day of January, 1985.

_____

Justice, Supreme Court of the
State of Louisiana

APPENDIX F

RESOLUTION

In accordance with the authority granted to the South Louisiana Port Commission pursuant to Acts I and II of the 1981 Regular Legislative Session, respectively amending Title 41, Section 1705, and Title 9, Section 1102.1, Louisiana Revised Statutes and pursuant to its By-Laws, the Commission hereby adopts the following resolution.

BE IT RESOLVED THAT:

1. Riparian owners and their lessees of property on navigable rivers, lakes or streams within the jurisdiction of this Commission shall have the right to erect and maintain on the batture or banks owned or leased by them and on the bed of the navigable river, lake or stream adjacent to or adjoining such batture or banks such wharves, buildings and improvements. Riparian owners or their lessees of riparian property which seek the consent of this Commission to the construction of such structures on the batture, banks or beds of navigable waterways shall submit to the Director of this Commission all maps, plans, details, and other documentation as submitted to the United States Army Corps of Engineers for such wharves, buildings, or improvements prior to beginning constuction of any such wharves, buildings or improvements on such property within the jurisdiction of this Commission.

2. The Commission, upon review of the aforementioned maps, plans, details and other documentation, shall issue, through its Director, either a "Letter of No Objection" or a "Letter of Objection" within the legal delays established by the regulations promulgated by the United States Army Corps of Engineers.

3. Upon issuance of the permit by the United States Army Corps of Engineers which shall constitute compliance with safety and accepted navigation regulations, the Director shall issue a "Letter of Consent" or other permitting document to the affected riparian owner and its lessee except in those instances wherein there is a current need for public use.

4. Riparian owners and their lessees of property on navigable rivers, lakes or streams within the jurisdiction of

this Commission which have constructed and maintained wharves, buildings or improvements on the batture or banks owned or leased by them and on the bed of the navigable river, lake or stream adjacent to or adjoining such batture or banks in accordance with permits granted by the United States Army Corps of Engineers prior to the enactment of Acts I and II of the 1981 Regular Legislative Session shall be deemed to have constructed such facilities with the consent of this Commission.

5. This resolution shall be effective from the 22nd day of September, 1982.

Office - Supreme Court, U.S.
FILED
APR 6 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1281

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WATSON MARINE SERVICE, INC.,
Appellant-Petitioner,

v.

KLIEBERT EDUCATIONAL TRUST AND
TIMOTHY A. BECNEL INTER VIVOS TRUST,
Appellee-Respondent.

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE TO DISMISS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA JURISDICTIONAL STATEMENT OR TO AFFIRM THE JUDGMENT OF THE STATE COURT

THOMAS J. KLIEBERT, JR.
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BEST AVAILABLE COPY

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QUESTIONS PRESENTED

This appeal tries to raise the following questions as set forth by the Appellant:

1. Where, at the time appellant-petitioner's anchor pilings were placed in the bed of the Mississippi River adjacent to or adjoining appellee-respondent's riparian property, the State of Louisiana, acting through its duly authorized South Louisiana Port Commission, did not require that persons constructing such work obtain a state permit, and subsequent Port Commission regulations requiring a permit contained a grandfather clause exempting existing works, do these riparian landowners have standing, under federal or state law, to bring a private right of action in state district court to force the removal of anchor pilings constructed pursuant to a valid permit issued by the Army Corps of Engineers?

2. Where a state statute purports to grant to each riparian landowner the exclusive right to erect and maintain works or structures in that portion of the Mississippi River bed adjacent to or adjoining his riparian land, as well as the accessory right to prohibit and prevent others from using the bed of the river adjacent to or adjoining his riparian land for navigational activities which promote and further interstate commerce, unless the user pays each such riparian landowner the rent he arbitrarily demands, regardless of the reasonableness of the rental amount or other lease terms fixed by the riparian landowner; is the state statute an unconstitutional interference with Congressional power to regulate commerce "among the several states because its application constitutes a substantial impediment to the free flow of commerce across state lines?

3. Where a state statute purports to grant each riparian landowner the exclusive right to erect and maintain works or structures in that portion of the Mississippi River bed adjacent to or adjoining his riparian land, as well as the accessory right to prohibit and prevent others from using the bed of the river adjacent to or adjoining his riparian land for navigational activities which promote and further interstate commerce, unless the user pays each such riparian landowner the rent he arbitrarily demands, regardless of the reasonableness of the rental amount or other lease terms fixed by the riparian landowner, does the state statute unconstitutionally interfere or conflict with Congressional power to regulate the local incidents of interstate commerce, in cases such as this one, where the class of acts involved are nationally significant in their aggregate economic effect.

4. Where the interpretation and application of L.S.A.-R.S. 9:1102.1 retards, impedes, burdens or otherwise constitutes an obstacle to the accomplishment and execution of the full purposes, objectives and intentions of Congress in enacting the River's and Harbors Act of 1899, must the state statute be held void, even if enacted by the Louisiana Legislature for a valid purpose and without the intention of frustrating federal law or federal policy?

5. Does L.S.A.-R.S. 9:1102.1, by purportedly granting riparian landowners of their lessees the exclusive right to place constructions in the bed of a navigable river adjacent to or adjoining their riparian property, constitute an alienation of the bed of a navigable river in violation of Article IX, Section 3 of the Louisiana Constitution of 1974?

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APPENDIX A:

Reasons for Judgment set forth by the 23rd Judicial District Court for the State of Louisiana, in *Kliebert Educational Trust, et al.* v. *Watson Marine Services, Inc., et al.*, No. 15,683 by Honorable Leon J. LeSueur 1a

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IN THE

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MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE TO DISMISS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA JURISDICTIONAL STATEMENT OR TO AFFIRM THE JUDGMENT OF THE STATE COURT

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Louisiana on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATUTES

The pertinent Louisiana statute involved is L.S.A.-R.S. 9:1102.1 which reads as follows:

> A. Riparian owners and their lessees of property on navigable rivers, lakes, or streams within the limits of any deep water port commission of this state or, in the absence of any such commission, within a municipality having a population in excess of five thousand inhabitants, shall have the right to erect and maintain on the batture or banks owned or leased by them and in the bed of the navigable river, lake, or stream adjacent to or adjoining such batture or banks, such wharves, buildings, or improvements as may be required for the purposes of commerce, navigation, or other public purposes. However, where such owners first have obtained the consent of the governing authority of the deep-water port commission, which consent each deep-water port commission is hereby authorized to grant, or of the municipality, as the case may be, to erect such wharves, buildings, or improvements, and same are erected in conformity to plans and specifications which have been approved by such governing authorities, those governing authorities may expropriate said wharves, buildings, or improvements whenever said improvements or the riparian front shall be required for public purposes, and the owners shall be entitled to claim compensation to the full extent of their loss, but where such consent and approval is not obtained, the owners shall be entitled to be paid compensation therefor to the full extent of their loss or required to remove such wharves, buildings, or improvements at their own expense, in the discretion of the governing authority of the deep-water port commission or of the municipality. In all cases, such wharves, buildings, or improvements shall remain subject to the administration and control of the governing authorities

with respect to their maintenance and to the fees and charges to be exacted for their use by the public.

B. Nothing herein shall deprive the levee boards of their authority with respect to levees in their respective districts or their right to appropriate, without compensation, such wharves, buildings, or improvements.

PROCEEDINGS BELOW

The Supreme Court of the State of Louisiana denied appellant-petitioner's application for Writ of Certiorari or writ of Review to the Louisiana Court of Appeal for the State of Louisiana on November 2, 1984. A copy of the Supreme Court of Louisiana decision is attached to the Jurisdictional Statement filed by Appellant and marked as Appendix A.

On July 30, 1984, the 5th Circuit Court of Appeal for the State of Louisiana affirmed the judgment of the 23rd Judicial District Court for the Parish of St. James. A copy of the Fifth Circuit Court of Appeal decision is attached to Appellant's Jurisdictional Statement as Appendix B. The district court found that Watson Marine Services, Inc. was operating a warehousing operation for barges while in storage. It also found that the warehousing opertion being conducted by Appellant concerned the bed of a stream and not its navigability or its use as a highway of commerce. The court further found that Watson Marine Services, Inc. had not complied with the permit issued by the U.S. Corps of Engineers as they had not obtained authorization from riparian landowners.

ARGUMENT

The Case Presents No Substantial Federal Question.

Appellant claims jurisdiction of this Court pursuant to the provisions of Title 28, United States Code, Section 1257(2).

1.

The first issue raised by Appellant is whether riparian landowners have a right to bring an action under state or federal law to remove works from the bed of a navigable river when the works have been placed there pursuant to a valid Corps of Engineers permit.

First, the district court found that the permit specifically required approval from riparian landowners and that Watson had failed to do this. See Reasons For Judgment attached hereto as Appendix "A". Furthermore, the permitting process by the Corps is designed only to protect an impediment to navigation.

Second, the trial court found Watson's activities to be outside of navigation. The barges were being stored and warehoused. The control and ownership of the beds of navigable streams remains with the State and the joint assent of the Corps of Engineers is necessary only as to the effect the erection of a structure has with relation to navigability.

In essence, the Appellant seeks to appropriate the rights of riparian owners and of the public to free navigation and commerce for its personal business of storing and warehousing in the name of deprivation of free navigation, when in fact, as found by the state courts it is Appellant's use for his personal benefit

which impinges on free navigation. The U.S. Army Corps of Engineers' permit allows this impediment to free navigation but specifically required the Appellant to seek approval from the riparian owners, and it is that approval that this Appellant has failed to obtain.

The opinion of the Fifth Circuit Court of Appeal is adopted herein by reference for its statement on the necessity of joint assent by the State and Federal Government.

2.

The second allegation by the Appellant concerns rent to be paid by Watson Marine Services, Inc. which is an impediment to the free flow of commerce. This case was solely concerned with an injunction and there have been no allegations or demands for rent being made that are contained in the record. Again, the district court found the activity to be outside navigation. Watson Marine Services, Inc. and others can navigate all day long but they cannot set up a warehousing operation that blocks ingress and egress to a riparian landowners' property.

3.

Issues 3, 4 and 5 as presented by Appellant are repetitious in and of themselves and in conjunction with issues one and two. The reasons for judgment given by the trial court and his finding of facts and the law as stated by the 5th Circuit Court of Appeal properly set forth the law as applied to the facts in this case.

4.

Appellant, Watson Marine Services, Inc., makes an attempt to bring this case within the jurisdiction of this Court by claiming that the decisions of the several courts below are repugnant to the Constitution, treaties or law of the United States. The only assertion by Appellant is that since it had a valid permit from the Corps of Engineers, that the law of Louisiana could not interfere with its activities.

It is well recognized that the construction of wharves, anchorages or other structures within any port area in Louisiana requires the concurrent consent of Louisiana and the United States. *Cummings* v. *Chicago,* 188 U.S. 410, 23 S. Ct. 472, 47 L.Ed. 525 (1903); *North Shore Boom and Driving Co.* v. *Nicomeu Boom Co.,* 212 U.S. 406, 29 S. Ct. 355, 53 L.Ed. 574 (1909); *In Re Silver Bridge Disaster Litigation,* 381 F. Supp. 931 (S. D. West Vir. 1974); *Zabel* v. *R. P. Tabb* 296 F. Supp. 764 (M.D. Fla. 1969); La. Civ. Code Arts. 450, 452, 458; 33 U.S.C.A.: 401, 403.

This Court, in *Cummings,* supra, interpreted the federal statute that Appellant relies upon, the tenth section of the Rivers and harbors Appropriations Act of 1899 (33 U.S.C.A.: 401, 403), hereinafter referred to as the "Act". The issue presented in *Cummings* was whether Congress had intended to ignore the wishes of the State of Illinois by authorizing the Secretary of War to issue a permit for a construction in a navigable waterway wholly within the borders of Illinois. This Court stated:

> . . . The effect of that act reasonably interpreted is to make the erection of a structure in a navigable river, within the limits of a State depend

> upon the concurrent or joint assent of both the National Government and the State Government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies. 188 U.S. at 431, 23 S. Ct. at 477.

The *Zabel* case, supra, acknowledged the rule in *Cummings,* i.e., requiring approval from local agencies, as well as Federal agencies, to be one as to which the parties could not take issue. 296 F. Supp. at 765. A permit issued by the federal government ". . . merely expresses the assent of the Federal government so far as concerns the public rights of navigation . . ." but in no way does" . . . it obviate the necessity of obtaining State assent to the work authorized . . ." *Norfolk Dredging Company* v. *Radcliff Materials, Inc.,* 264 F. Supp. 399, 401 (E.D. Vir. 1967).

The above quotation from the *Norfolk* case not only follows the clear intent of Congress and this Court but was the exact language of the permit granted the plaintiff in this case by the U.S. Army Corps of Engineers.

The Louisiana Court in this present case have only affirmed the proposition that both state and federal assent are necessary. It was then found that under Louisiana's property law, Appellant-Watson Marine Services, Inc. committed a trespass on the riparian owners rights and have in fact blocked ingress and egress from their land into the navigable water.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or in the alternative, to affirm the judgment entered by the Court below. The decision below only reiterates this Court's prior decisions on joint assent and based upon that, ruled on the applicable state law, independent of any federal concerns and found in favor of Appellee on the State grounds. Appellant has failed to show any burden or interstate commerce, but has only shown a burden on a private enterprise that rents spaces to warehouse barges.

Respectfully submitted,

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APPENDIX

APPENDIX A

23RD JUDICIAL DISTRICT COURT

PARISH OF ST. JAMES
STATE OF LOUISIANA

Number 15,683

KLIEBERT EDUCATIONAL TRUST, et al

versus

WATSON MARINE SERVICES, INC. et al

REASONS FOR JUDGMENT

Plaintiffs, owners of adjacent tracts of land fronting on the Mississippi River in St. James Parish, filed this suit against Watson Marine Services, Inc., and two other parties seeking to enjoin them from conducting certain barge operations in front of their properties. In addition to alleging their ownership of the lands and the presence of the barges in the front thereof, it is also alleged that defendants have caused mooring anchors and floating buoys to be installed offshore and in front of their properties without having obtained permission. The suit seeks a rule to show cause why an injunction should not issue and the ultimate prayer is for judgment enjoining the barging operation as well as the removel of the anchors and buoys all of which block ingress and egress to their river frontage. Two of the original parties defendant were dismissed leaving Watson as the sole party against whom relief is sought.

The testimony adduced, together with admissions contained in the pleadings and the briefs filed, support the establishment of the following facts:

There is no question but that the plaintiffs are the owners of their respective properties, as alleged. Watson Marine is engaged in what is known as a barge fleeting operation which is conducted in the Convent area of St. James Parish in the Mississippi River on both sides of as well as in front of the lands abutting the river owned by the plaintiffs. A barge fleeting operation is in the nature of or may be considered as a warehousing operation whereby Watson Marine assumes responsibility for the storage and handling of barges, during the delays necessary, in order to get their cargo shifted to ocean going vessels, through such time as the barges may be put back into use. In order to harbor these barges, Watson Marine has constructed along the east bank of the Mississippi River in the Convent area, a series of mooring anchors or pilings. Each of these is placed in the bed of the river and to it is attached a chain to the other end of which is attached a buoy which floats on the surface of the river. To this end of the chain the barges are secured and they are then stretched either singley or abreast along some 8,000 feet of the river in the area mentioned.

Watson Marine caused an anchor piling to be placed in front of plaintiffs' properties. This was done without approval or permission of the plaintiffs, but solely by the authority of a permit issued by the United States Corps of Engineers to Ryan-Walsh Stevedoring Company and assigned ultimately to Watson Marine. Not only is the anchor piling situated in front of the lands belonging to the plaintiffs but also the buoy and barges as well.

The defendant urges the following defenses:

1) That the use of a summary procedure is inappropriate.

2) That plaintiffs have neither a right nor a cause of action, any such rights seeking the removal of the offending anchor and buoy being reserved to the United States Corps of Engineers, the South Louisiana Port Commission or the State of Louisiana and not the plaintiffs, and,

3) That the conduct of the defendant is appropriate.

Logically, it would appear that the issues presented should be resolved by first addressing the matters raised by defendant's exception of no right or cause of action for, obviously, if the law does not afford to these plaintiffs the relief they ultimately seek then neither the procedural method employed nor the appropriateness of defendant's actions would be of any consequence.

Briefly stated, the plaintiffs assert that they, and they alone, have the sole and exclusive right and authority to use their river front in the manner used by the defendant and that the unauthorized use thereof by the latter constitutes a trespass, relief from which can and should be afforded by injunction. In this connection they rely upon the provisions of R. S. 9:1102.1 (A), the pertinent provisions of which provide as follows:

> "A. *Riparian owners* and their lessees of property on navigable rivers, lakes, or streams within the limits of any deep water port commission of this state or, in the absence of any such commission, within the municipality having a population

> in excess of five thousand inhabitants, *shall have the right to erect and maintain on the batture or banks owned or leased by them and in the bed of the navigable river, lake or stream adjacent to and adjoining such batture or banks,* such wharves, buildings, or improvements as may be required for the purposes of commerce, navigation, or other public purposes . . ." (Emphasis added).

There is no question but that the properties with which we are here concerned are within the limits of the South Louisiana Port Commission. In conformity with the provisions of the above quoted statute, the South Louisiana Port Commission (the deep water port commission having authority in St. James Parish) has adopted certain rules and regulations, (a copy thereof being attached to the pleadings herein as Addendum No. 1) for its permit procedures.

Under these procedures, the defendant or anyone else, before erecting any structures in the river or its bed, would be required to comply with Sec. III (3) as follows:

> "If the applicant is *other* than the *owner, a copy of the deed of the owner with a certified copy of the lease or permit from the owner by which he conveys his rights to the applicant.*" (Emphasis added).

Defendant contends that the above statutory provisions are not determinative of the issues presented here, it being their contention that the right to regulate the navigability and the bed of the Mississippi River lies in the United States and particularly its Corps of Engineers by virtue of the provision of 33 USC Sec. 10

which provides that "all the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways."

It appears that upon the admission of Louisiana into the Union in 1812 Congress did not address the issue of ownership of the lands under the navigable rivers, lakes and streams of the state. *A. N. Yiannopoulos, Property* Sec. 41 n. 2 *Louisiana Civil Law Treatise* 109 (1980); see also Notes, and *Civil Law Property, Beds of Navigable Waters, Susceptibility of Ownership,* 15 La. Law Review 463 (1954-55); Comments, *The Public and the Private Domains of the State,* 12 Tulane Law Review 428 (1938); and *Ownership of the Beds of Navigable Lakes,* 21 Tulane Law Review 454, 457 (1947). The only reference by Congress to the control or ownership of the navigable rivers in Louisiana, in particular, the Mississippi River, provide that: "The River Mississippi and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways and forever free . . ." Act of April 14, 1812, c. 57, 2 Stat. 641, 642, 703. Given the foregoing language, the matter of whether the State owned the beds of navigable rivers because a matter of the State's discretion. See A. N. Yiannopoulos, supra at Sec. 41, page 110-11. The Courts of Louisiana, applying LSA CC Article 453, have stated clearly that the beds of navigable rivers are insusceptible of private ownership and are owned by the state. See *Wemple v. Eastham, State v. Richardson,* and also *Miami Corporation v. State.* The provisions of R. S. 9:1102.1(A) and the rules of the South Louisiana Port Commission are consistent with this jurisprudence.

In spite of the foregoing, defendant asserts that it has a right to conduct its operations, which right is to be found in the permit granted by the United States Corps of Engineers to Ryan-Walsh Stevedoring Company, Inc., and by the latter assigned to it. Examination of the latter assignment however finds the following provisions:

> "2. Installation of anchor piles and mooring buoys shall be made only in areas for which *Watson has obtained batture leases and/or specific authorization of the riparian landowner.*" (Emphasis added).

The underscored portion of the foregoing has not been complied with. From the above this Court concludes that:

1) The United States, through its Corps of Engineers, while it has the power to regulate the navigability aspects of the Mississippi River does not have power with respect to its bed, the latter being vested in the State of Louisiana. The "warehousing" operation being conducted here concerns the bed of the stream and not its navigability or its use as a highway of commerce.

2) The defendant cannot rely on such rights as the Corps of Engineers could grant them for the further reason that they have failed to comply with the requirement that authorization be obtained from the riparian landowners which are contained in both the assignment and rule of the port commission found above.

3) That the plaintiffs have real rights granted to them by the statutes and jurisprudence set forth

above that are the subject of protection by injunctive relief.

Having concluded that the exceptions of no right or cause of action are without merit and that the actions of defendant are without legal sanction and in violation of the rights of plaintiffs, the Court now addresses itself to the questions raised by the exception of improper use of summary procedure. This defense was raised for the first time on the morning of the hearing at which time it was argued and overruled. After the exception was overruled the defendant then proceeded to trial without apparant difficulty. Witnesses, expert and otherwise, were called and testified and other evidence introduced. There is neither allegations nor showing that any disadvantage resulted and no appelate relief has been sought with respect to the Court's ruling.

The Court concludes that plaintiffs have alleged, and proved a trespass that defendant has not been prejudiced by the procedural method employed and that, therefore, plaintiffs are entitled to the relief for which they have prayed. Such relief, however, will be limited to a preliminary injunction at this time rather than a permanent injunction as prayed for.

Judgment in according with the foregoing has been handed down this date.

Napoleonville, Louisiana, this 4th day of August, 1983.

/s/ Leon J. LeSueur
Judge Div. A